Legal Developments

Issue 2

Information for USAID partner organizations operating in Belarus, Moldova and Ukraine, provided by the Legal Office of the Regional USAID Mission for Ukraine, Belarus and Moldova

Highlights – December 2002
- Continuing under a continuing resolution
- Expat visas in Moldova
- New Ukrainian customs procedures

United States

Continuing resolution. USAID continues to operate under a series of continuing resolutions, the latest of which covers the period through January 11, 2003. USAID is not allowed to initiate new projects under a continuing resolution. New reports suggest that leaders in the next session of Congress will seek to have the appropriations acts passed by the end of January.

Lobbying. Under U.S. federal law commonly called the “Byrd Amendment”, recipients of assistance and contractors are expressly prohibited by law from using federal funds to “lobby” Congress, USAID, or their employees, with respect to the awarding of federal contracts, the making of any grants or loans, the entering into cooperative agreements, or the extension, modification or renewal of these types of awards. USAID’s implementing regulations are in 22 C.F.R. part 227. USAID partners must also report lobbying expenditures from non-federal sources which they used to obtain such federal program monies or contracts. The Byrd Amendment restrictions apply to the making, with an intent to influence, any communication to or appearances before Congress or USAID on a covered matter. Limited exceptions do apply.

Restructuring compensation plans. USAID partners undertaking to review their arrangements or compensation for local personnel should remember FAR section 31.205-6(a)(4) and its assistance analog. It states that “no presumption of allowability will exist where the contractor introduces major revisions of existing compensation plans or new plans and the contractor- (i) Has not notified the cognizant [contracting officer] of the changes either before their implementation or within a reasonable period after their implementation, and (ii) Has not provided the Government, either before implementation or within a reasonable period after it, an opportunity to review the allowability of the changes.” It is important not only to ensure that arrangements are consistent with local law, but also that they are compatible with the terms of the USAID agreement and the documentation and other requirements involved in the cost principles applicable to staff-related expenses.

Geographic Code 110. Belarus, Moldova and Ukraine have borders with countries that are *not* included in Geographic Code 110 (“New Independent States”), which in most Mission agreements is an authorized code for goods procured with USAID funding. This is true even though some of those countries were part of the former Soviet Union. Thus, under most agreements, goods sold and/or produced in Hungary, Latvia, Lithuania, Poland, Romania or Slovakia are not eligible for Regional Mission financing in the absence of a waiver approved by the Mission Director, despite the convenience of those countries' status as neighbors. See 22 C.F.R. part 228.

Foreign earned income exclusion. American expatriates: "for 2002, the maximum amount of foreign earned income that you may be able to exclude from your U.S. gross income has increased to $80,000." See IRS Publication 54.

Ukraine

Customs clearance procedures. There is mixed news to report with respect to clearance of goods through customs, which will affect your customs brokers. In anticipation of new rules and procedures on customs clearance that come into effect in 2003, along with the new Customs Code, the State Customs Service has issued interim orders Nos. 555 and 561. They deal with the procedures for customs declarations, inspections and clearance, and have the benefit of requiring uniformity in customs clearance. Beginning December 1, customs offices must perform customs clearance according to a uniform procedure, and may not alter the requirements or process for customs clearance – this should reduce the unpredictability of customs processes, although the procedures themselves look to become more complex. Order No. 561 is also the model for a draft resolution of the Cabinet of Ministers of the Ukraine that will, according to law, establish the permanent customs clearance procedures for the new Customs Code, instead of a State Customs Service act. Order No. 561 also has the effect of rescinding all prior orders on the subject matter with which it deals. There are moves afoot to postpone implementation of the new customs code from January 1.

Hiring entrepreneurs. Reviews conducted by the Regional Mission's Office of Financial Managements reveal that some partners are acquiring staff in the context of the Law of Ukraine on Entrepreneurship, rather that through traditional employment contracts. As noted above in the section on U.S. developments, the nature of doing business with USAID is such that these mechanisms for acquiring staff not only should be compatible with local law, but also must be consistent with requirements imposed by USAID agreements, including applicable cost principles. Consider the possible tensions in treating staff as sole proprietor contractors under Ukrainian law while identifying them as employees to USAID (*i.e.*, under U.S. regulation). The U.S. Government promotes the rule of law and transparency in Ukraine, and this policy is relevant to partners' conduct of their business. The AIDAR, for example, explicitly makes that connection: a "contractor acknowledges that its contract is an important part of the United States Foreign Assistance Program and agrees that its operations and those of its employees in the Cooperating Country will be carried out in such a manner as to be fully commensurate with the responsibility which this entails." The Legal Office believes that certain categories of staff are incompatible with the intent of the Law on Entrepreneurship. In those cases in which use of an entrepreneurial contract can be justified, care should be taken to comply with applicable Ukrainian law. This includes ensuring that individuals are in fact registered as entrepreneurs. As a final "heads up", please note that there are proposals within the Government of Ukraine to revoke certain tax rules beneficial to individual entrepreneurs.

Ukrainian report requests. The Regional Mission has learned that partner organizations, including subrecipients, are being asked by various government entities to provide semiannual and final reports pursuant to paragraphs 24 through 27 of the Cabinet of Ministers Regulation No. 153, of February 2002. These reporting requirements are the least susceptible of the provisions of Regulation 153 to the argument that they conflict with, and therefore are superseded by, the 1999 Memorandum of Understanding on procedures for United States assistance programs. Partners – particularly those with Ukrainian organizational status – should carefully consider the risks involved in refusing to comply with the reporting requirements, and are encouraged to work with USAID to coordinate reporting. Doing so will reduce the possibly negative consequences of having different levels of compliance among partners.

Belarus

Tax exemption procedures and rights. The U.S. Embassy has delivered a diplomatic note prepared by USAID, asking the Government of Belarus to take the steps necessary to bring Resolution 56/59 into step with the treaty on U.S. assistance, and to fully implement the tax and duty exemptions procedures required by the Resolution and the treaty. The note also requests the Government to recognize eligible organizations without delay.

Moldova

Expatriate visa developments. USAID is leading a donor effort to address the question of expatriate visas to the Government of Moldova. A large number of donors have signed the letter, drafted by USAID, which asks the Government to abolish the ninety day stay limit and allow assistance program expatriates to remain in Moldova up to the full length of their year-long visas.

Exemption letter formatting. Please note that USAID's Moldova Office recently agreed to change the format of the letter provided, pursuant to the procedure on VAT exemptions, to local vendors. The letter is now addressed to local vendors (in general), rather than "to whom it may concern", in order to accommodate scrutiny by the tax authorities.

Banking regulations. The National Bank of Moldova has listed the commercial bank transactions in which a non-resident entity may engage, including withdrawal of cash in leis for office uses. Unfortunately, it is not yet clear whether all USAID partners fit the legal definition of "non-resident entity." The Moldovan authorities have been asked to clarify this question, which applies to corporate, not personal, accounts. This issue should be discussed with a bank when a corporate bank account is being opened.